Case No. 83-1749

In the Supreme Court of the United States

October Term, 1983

HEINRICH SCHMIDT REEDEREI,
Petitioner,

vs.

WILLIE MAE BYRD, as Administratrix of the Estate of Lawrence Byrd, deceased,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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The respondent, WILLIE MAE BYRD, as Administratrix of the Estate of Lawrence Byrd, deceased, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Fifth Circuit's opinion in this case. That opinion is reported at 722 F.2d 114.

REASONS WHY THE WRIT SHOULD BE DENIED

The petitioner's argument is limited to a single paragraph. In that paragraph, the petitioner argues that this Court's decision in *Jones & Laughlin Steel Corp. v. Pfeifer*, ... U.S. ....., 103 S. Ct. 2541, 76 L.Ed.2d 768 (1983), *mandates* that litigants be allowed to utilize any of the three currently recognized methods for calculating an award of

future pecuniary damages in an inflationary economy—and that the lower court "violated" that mandate by requiring litigants in the "Old Fifth" Circuit to utilize the "below market discount rate" method. We disagree.

In *Pfeifer*, although this Court eschewed the task of selecting one of the three methods as a mandatory rule, it did not mandate the availability of all three methods. Instead, it discussed the pros and cons of each; concluded that the evidence was inconclusive concerning the economic accuracy of each of the three methods; and decided that it would "do no more than necessary to resolve the case before [it]". It held thereafter only that use of the "total offset" method was not mandatory in federal courts. The lower court's decision in this case does not mandate use of the "total offset" method in federal courts in the "Old Fifth" Circuit, so it clearly does not "violate" this Court's holding in *Pfeifer*.

In our judgment, the question decided by the court below was left "open" in *Pfeifer* for further consideration by Congress and the lower courts. Deciding an "open" question simply does not create "conflict", and this Court therefore need not intervene in this case for the purpose of reaffirming *Pfeifer*. If it is to intervene at all, intervention can be justified only by a consensus that the lower court's decision is simply wrong. The lower court's decision is not clearly wrong, however. In fact, it is perfectly consistent with everything which this Court said in *Pfeifer*.

It is clear from *Pfeifer* that, of the three methods discussed, the "total offset" method was deemed to be the least desirable method to utilize in federal trials. This Court also implicitly disapproved the "specific forecast of future price inflation" method—noting that it would "normally be a costly and ultimately unproductive waste of . . .

resources to make such forecasts the centerpiece of litigation . . ."; voicing its concern that utilization of the method would tend to convert the average trial "into a graduate seminar on economic forecasting"; and stating that "trial courts should be discouraged from pursuing that approach". Finally, this Court held that a trial court utilizing the third method, the "below market discount rate" method, "should [not] be reversed if it adopts a rate between one and three percent and explains its choice". The obvious answer to the question left open in *Pfeifer* is therefore clearly suggested by *Pfeifer* itself—and all that the lower court did in this case was answer the open question exactly as *Pfeifer* suggests it should be answered.

And, as the lower court's decision makes clear, the question needed to be answered for practical reasons—efficiency and economy in the conduct of trials. The method selected by the lower court is clearly the most efficient and economical method of the three; and given this Court's recognition in *Pfeifer* that all three methods yield only rough approximations, mandating the use of one rough approximation over another appears to cause no real harm in the ultimate outcome of any given suit. Surely, if a trial court cannot be reversed for mandating use of the "below market discount rate" method in any given trial, as this Court squarely held in *Pfeifer*, the Court of Appeals cannot be reversed for mandating use of that method in the trial courts which it supervises. Put another way, this Court must reverse itself in order to reverse the lower court in this case. With the ink scarcely dry on *Pfeifer*, we do not believe this Court should revisit it at this time.

The question presented here might be appropriate for review at some future date, if it becomes necessary to

resolve conflicts among the circuits in post-*Pfeifer* decisions. No such conflicts have arisen, however, and for the time being, we think the implications of *Pfeifer* deserve to be thrashed out in the lower courts before this Court tackles the question left open in *Pfeifer*. Because the lower court's decision is perfectly consistent with *Pfeifer*, and because no conflicts have yet developed among the lower courts concerning the implications of *Pfeifer*, we respectfully submit that certiorari should be denied.

Respectfully submitted,

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